

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 04-20005
)	
PHILIP WAYNE CARTER,)	
)	
Defendant.)	
)	

ORDER

The Supreme Court of the United States has held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Most recently, the Court held that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004).

Although Blakely addressed the Washington state sentencing system, many jurists were concerned that it would also impact the federal sentencing scheme as well because the United States Sentencing Guidelines allow a judge to find additional facts that increase a defendant’s sentence. The Seventh Circuit addressed this concern and found that in cases such as Blakely,

where the defendant's Sixth Amendment right is implicated, the Guidelines are unconstitutional. United States v. Booker, 2004 WL 1535858, at *4 (7th Cir. July 9, 2004).

In explaining how to proceed in those cases, the Seventh Circuit found that the result depended on whether the Guidelines were severable or not, an issue not before that court. Id. at *5-6. If the Guidelines are severable, then sentencing courts can either impose a sentence that requires no judicial factfinding or empanel a sentencing jury to find beyond a reasonable doubt the facts that would justify a higher sentence. Id. at *5. If the Guidelines are not severable, then in those cases, they are unconstitutional in their entirety and the sentencing judge is limited only by the statutory minimum and maximum in imposing a sentence. Id. at *6. The judge may, of course, use the Guidelines as a recommendation, but is not required to follow them. Id.

This court is now faced with a case that raises a Blakely issue. Defendant Philip Wayne Carter was convicted by a jury of unlawful possession of a firearm, kidnaping, and carrying a firearm during a violent crime. The presentence report (PSR) includes enhancements to the base offense level for sexual exploitation of the victim, obstruction of justice for committing perjury, and obstruction of justice for creating a substantial risk of serious bodily injury while fleeing from a law enforcement officer. Moreover, the PSR characterizes Carter as an Armed Career Criminal. Carter has objected, based on Blakely, to the three enhancements and to the Armed Career Criminal characterization.

After reviewing the recent flurry of caselaw on the issues raised by Blakely, this court finds that the US Sentencing Guidelines are not severable. In reaching this conclusion, this court is persuaded by the reasoning of the court in United States v. Croxford, 2004 WL 1521560 (D. Utah July 7, 2004). This court believes that severing the Guidelines and applying only portions

of the sentencing scheme would contravene the goals of Congress and would distort the intended effect of the Guidelines.

Having made this determination, this court must conclude that in this case, as in other cases raising a Blakely issue, the Guidelines are unconstitutional in their entirety. Booker, at *6. In imposing a sentence now, this court will look to the PSR and the Guidelines for recommendations and guidance, but this court is free to exercise its discretion within the statutory limits. In addition to the discretionary sentence this court chooses, this court will also announce the sentence it would have imposed under the Guidelines, should the United States Supreme Court subsequently rule that the Guidelines are in fact constitutional.

ENTERED this 23rd day of July, 2004

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE